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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DEWEY T. NABORS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY OF PETITIONER DEWEY T. NABORS, JR.

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REPLY OF PETITIONER DEWEY T. NABORS, JR.

Petitioner, Dewey T. Nabors, Jr., herein responds to the brief submitted by the Solicitor General for the United States in opposition to Petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ARGUMENT

The Solicitor General's brief is a somewhat surprising response to Petitioner's application for a writ of certiorari. Rather than addressing the substantive legal issues in a straightforward manner, the Solicitor General's brief is largely devoted to conclusory assertions supported, if at all, by disingenuous manipulations of the relevant decisional authority. After setting forth arguments which

baldly assume a decision favorable to the government on the very issues presented for review, the Solicitor General then nimbly pulls himself up by his own bootstraps and concludes that there are no substantial issues for consideration by this Court.

Admission of Evidence of Petitioner's Pre-Arrest Silence

Typical of his misguided response to Petitioner's application for a writ of certiorari, is the Solicitor General's argument that the instant case does not present the question, left open in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980), "whether or under what circumstances prearrest silence may be protected by the Fifth Amendent." (Solicitor General's Brief at 4 n.1). The Solicitor General attempts to justify this remarkable assertion by first summarily concluding that silence "in the absence of any official compulsion does not implicate . . . Fifth Amendment" protections against self-incrimination,[1] and then suggesting that "official compulsion" *must* take the form of "governmental interrogation" at the time of the defendant's silence. (Solicitor General's Brief at 3).

The Solicitor General's emphasis on the absence of "governmental interrogation" in this case merely begs the question left open in *Jenkins* and now presented for review. Although Justice Stevens, in his concurring opinion

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[1] The Solicitor General's citation of *Jenkins v. Anderson* in support of this proposition indicates the degree to which he has confused this Court's separate analyses of the due process and self-incrimination claims raised by the defendant in that case. Whereas the absence of governmental interrogation in *Jenkins* was relevant to the defendant's due process claim, *see* 447 U.S. at 238-40, it was not a factor in this Court's analysis of the defendant's claim under the self-incrimination clause of the Fifth Amendment. Indeed, the majority in *Jenkins* explicitly stated that, in light of *Raffel v. United States*, 271 U.S. 494 (1926), its decision did not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment right to remain silent. 447 U.S. at 236 n.2. The Solicitor General's reliance on *Fletcher v. Weir*, 445 U.S. 608 (1982) is similarly misplaced.

in *Jenkins*, did suggest that an individual's right not to incriminate himself exists only when he is under "official compulsion" to speak, 47 U.S. at 242-44, this view was flatly rejected by Justices Marshall and Brennan and has never been endorsed by a majority of this Court. *See id.* at 250 n.4 (Marshall, J., dissenting). The majority in *Jenkins* simply applied this Court's prior ruling in *Raffel v. United States*, 271 U.S. 494 (1926), to hold that a defendant who elects to testify in his own behalf waives Fifth Amendment objections to the prosecution's use of his pre-arrest silence for *impeachment purposes*. 447 U.S. at 235-38. Since the defendant in *Jenkins*, *unlike the Petitioner in this case*, elected to testify at his trial, it was not necessary for the Court to decide whether "official compulsion" is necessary to trigger Fifth Amendment protections against self-incrimination and, if so, whether such compusion must take the form of "governmental interrogation" at the time of the defendant's silence.

In this regard, Petitioner respectfully submits that prosecutorial comment upon a non-testifying defendant's pre-arrest failure to provide information pertaining to the charges against him is precisely the type of retributive sanction the Fifth Amendment was designed to prohibit. That Petitioner's silence in the present case was not in response to "governmental interrogation" is not controlling inasmuch as the violation of his Fifth Amendment rights occurred not when he remained silent, but when his silence was later used against him *by the government* as part of its direct case. *See Jenkins v. Anderson*, 447 U.S. at 250 n.4 (Marshall, J., dissenting).

The Solicitor General applies a similarly "flexible" analysis in arguing that since the prosecution could have used *voluntary* statements made by Petitioner in response to the insurance company's inquiry, it should be entitled to use Petitioner's failure to respond as well. (Solicitor General's Brief at 3-4). In addition to being unsupported

by the Solicitor General's cited authority,[2] this argument appears to rest on a misstatment of the rule that *voluntary* statements following a *knowing waiver* of an accused's privilege against self-incrimination are admissible. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). The Solicitor General apparently contends that since statements made by a defendant following a voluntary waiver of his Fifth Amendment privilege are admissible, the prosecution should be entitled to comment on the silence of a defendant who refuses to waive his privilege against self-incrimination. This conclusion, of course, was squarely rejected by this Court in *Griffin v. California*, 380 U.S. 609 (1976).

In this case, the Solicitor General cannot even seriously contend that Petitioner waived his privilege against self-incrimination.[3] Petitioner has consistently maintained

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[2] Each of the cases cited by the Solicitor General in support of this argument involves the admissibility, under an exception to the hearsay rule contained in Fed. R. Evid. 801(d)(2)(B), of evidence of a defendant's tacit admission of guilt (*See* Solicitor General's Brief at 4). Under Rule 801(d)(2)(B), evidence of an accused's s. ence is admissible over hearsay objections only where his silence manifests acquiescence to or adoption of a third party's accusation of guilt. *See United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). In the present case, Petitioner's silence was not in response to any accusation of guilt, nor did it manifest his acquiescence to or adoption of any third party statement.

[3] Nor can the Solicitor General maintain that had Petitioner responded to the insurance company's inquiry, he would have done so voluntarily. Although Petitioner might have determined that he had no choice but to respond to the insurance company if he had known that his silence would later be used against him by the government as part of its direct case, Petitioner would have been confronted with "a choice between the rock and the whirlpool," *Garrity v. State of New Jersey*, 385 U.S. at 496, and any information he might have provided would have been effectively compelled by the government.

throughout these proceedings that his decision to remain silent, commencing with his refusal to respond to the insurance company's demand for a statement under oath, and continuing through trial with his decision not to testify, was an invocation of his right to remain silent protected by the Fifth Amendment. Moreover, Petitioner asserted his privilege against self-incrimination at the earliest available opportunity by objecting to the admission of evidence of his pre-arrest silence, and announcing his intention not to take the stand, prior to the government's presentation of its direct case. Under these circumstances, Petitioner respectfully submits that the admission of evidence of his pre-arrest silence impermissibly burdened the exercise of his constitutional privilege against self-incrimination and that, upon full briefing and plenary consideration, this Court is likely to so find.

Admission of Evidence of Petitioner's Alleged Prior Similar Acts

No less surprising than his arguments concerning the propriety of admitting evidence of Petitioner's pre-arrest silence are the Solicitor General's contentions with respect to the admissibility of evidence of Petitioner's alleged prior similar acts. Although the Solicitor General asserts that Petitioner affirmatively placed his intent in issue, it is respectfully submitted that a review of the trial transcript shows that the issue of intent was never genuinely contested. In any event, the district court ruled upon the admissibility of "prior acts" evidence before the government had presented any evidence and without knowing the nature of Petitioner's defense. Rather than first determining whether the issue of intent would be contested and then balancing the government's need for prior acts evidence against its clearly prejudicial effect, the district court admitted evidence of Petitioner's alleged prior similar acts under the theory announced in *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980), that a defendant's mere plea of not guilty to conspiracy charges renders such evidence automatically admissible,

unless the defendant stipulates intent. As noted in Petitioner's application for a writ of certiorari, this "rule" is not only in conflict with decisional authority in at least three other circuits, but impermissibly burdens in accused's exercise of his Fifth and Sixth Amendment rights.

The Solicitor General's attempt to brush aside the conflict among the circuits on the question of whether a defendant's mere plea of not guilty will, in and of itself, justify the admission of extrinsic offense evidence is equally unpersuasive. Although the Solicitor General contends that each of the cases cited by Petitioner involved "substantive offenses," rather than conspiracy claims, he conveniently overlooks *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), a *conspiracy* case in which the Ninth Circuit held, contrary to the decision in the present case, that a defendant's mere denial of participation in the acts evidencing the crime charged does *not* raise the issue of intent. *Id.* at 448; *see also United States v. Coades*, 549 F.2d 1303 (9th Cir. 1977) (concluding that extrinsic offense evidence was not admissible to prove intent in an attempt case).

Finally, although the Solicitor General contends that it is constitutionally permissible to require a criminal defendant to "choose" between a jury finding the issue of intent and the introduction of prejudicial prior acts evidence, his argument assumes that such prior acts evidence is not only relevant to an issue in the case, but that the district court has determined that the government's need for such evidence outweighs its prejudicial effect. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). As noted above, however the district court in this case ruled on the admissibility of prior acts evidence before the government's direct case and without knowing the nature of Petitioner's defense. Petitioner respectfully submits that to *require* a criminal defendant either to stipulate intent or suffer the introduction of clearly prejudicial evidence, *without regard to the government's need for such evi-*

dence, deprives the accused of his rights to due process and trial by jury under the Fifth and Sixth Amendments to the United States Constitution. *See generally In re Winship*, 397 U.S. 358 (1970); *Screws v. United States*, 325 U.S. 91 (1945).

Denial of Petitioner's Motion to Compel the Government to Affirm or Deny the Use of Illegal Electronic Surveillance

As could be expected, the Solicitor General's response to Petitioner's arguments and authorities concerning the proper construction of the term "claim," as used in 18 U.S.C. § 3504 (1976), consists largely of citations to lower federal court decisions adopting definitions of that term more favorable to the government's position on this issue. (Solicitor General's Brief at 7-8). These additional citations, however, only serve to emphasize the conflict among the lower federal courts on the question of what constitutes a "claim" sufficient to trigger the government's obligation to affirm or deny the use of unlawful surveillance under section 3504 and underscore the need for Supreme Court guidance on this issue.

In apparent recognition of the conflict among the lower federal courts,[4] the Solicitor General offers an alternative argument. Contending that the sufficiency of the government's response to a claim under section 3504 should be

[4] The Solicitor General appears to suggest that, notwithstanding the differing interpretations of the term "claim" adopted by the lower federal courts, all of the cases construing § 3504 have required the defendant to make "detailed allegations" of illegal surveillance. In reaching this conclusion, however, the Solicitor General overlooks a number of cases wherein the government has affirmed or denied the use of electronic surveillance in response to allegations of wiretapping which were not particularized. *See, e.g., United States v. Lange*, 422 F.Supp. 400, 404 (E.D. Wis. 1976); *In re Grusse*, 402 F.Supp. 1232, 1234 (D. Conn.), *aff'd*, 515 F.2d 157 (2d Cir. 1975); *see also In re Grand Jury Proceedings*, 664 F.2d 423 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *People v. Grieco*, 94 Misc.2d 1043, 406 N.Y.S.2d 426, *aff'd*, 98 Misc.2d 310, 413 N.Y.S.2d 821 (1978).

judged in relation to the specificity of defendant's allegations of illegal surveillance, the Solicitor General concludes that Petitioner's claim was not sufficiently detailed to require the government to search its records and unequivocally affirm or deny the use of unlawful surveillance. Although this rationale for upholding the district court's denial of Petitioner's motion under section 3504 is suggested by the Court of Appeals' opinion, it is no more supported by the language or purpose of section 3504 than the requirement that Petitioner's claim consist of "an unequivocal statement" that illegal surveillance did in fact take place.

In the first place, to require detailed allegations of unlawful surveillance in order to trigger the government's obligation to unequivocally affirm or deny is simply a roundabout way of requiring that the defendant's claim consist of "an unequivocable statement" that unlawful surveillance did in fact take place. In those cases where the defendant is unable, due to the covert nature of electronic surveillance, to make such a statement, the government could simply contend that the specificity of the defendant's claim was insufficient to require a response. *See, e.g., United States v. See*, 505 F.2d 845, 856 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

More importantly, to allow the government to vary its response depending upon the specificity of the defendant's claim, ignores the gross disparity between the very real difficulties faced by a defendant attempting to establish unlawful surveillance and the minor administrative burden placed on the government in requiring it to affirm or deny the use of such surveillance.[5] The co-

[5] Although the Solicitor General contends that a record search of the National Security Agency would have delayed the trial and placed an undue burden on the government, the Assistant U.S. Attorney acknowledged at the pretrial hearing that an established procedure for an agency check, requiring only six to eight weeks, could have been effected. (Pet. App. A24). Moreover, counsel for Petitioner advised the district court at the hearing that Petitioner

vert nature of electronic surveillance, which makes it virtually impossible for a defendant to make an "unequivocal statement" that surveillance has occurred, also make is virtually impossible for a defendant to gather the evidence necessary to formulate "detailed allegations" that unlawful surveillance has taken place.

In any event, Petitioner respectfully submits that the government's response to Petitioner's claim under section 3504 was insufficient under any standard. Although the portions of the trial transcript selected by the Solicitor General for quotation seem to suggest that the government made a categorical denial of the use of any electronic surveillance, a more careful reading of the trial transcript shows that the Assistant U.S. Attorney offered only a qualified statement, expressing his *belief* that there had been no surveillance:

> I will state further . . . *so far as I know*, the evidence in this case is not derived from any monitoring of any kind. I've talked to every agent involved. I've read every report *I could find . . . so far as I can tell*, the case derived from observation of his activities . . . .

(Pet. App. A27) (emphasis added). The qualified statements provided by the government in this case stand in marked contrast to the responses given by the government in certain of the cases cited and apparently endorsed by the Solicitor General in his brief. For example, in *In re Grand Jury Proceedings*, 664 F.2d 423 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), the movant's allegations of electronic surveillance were remarkably similar to those made by Petitioner in the present case.

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had no objection to proceeding to trial prior to the conclusion of an agency check. (Pet. App. A33). *See United States v. Buck*, 548 F.2d 871, 874 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Hearst*, 412 F.Supp. 863 (N.D. Cal. 1975) (approving a similar procedure). Thus, it would appear that the government's concerns as to the delay and burden of conducting an agency check were more imaginary than real.

The movant, a grand jury witness and member of the Church of Scientology, and his attorney each submitted statements reciting their *belief* that their telephone conversations had been intercepted, together with documents evidencing a *policy* of certain federal and state agencies to conduct electronic surveillance of Church of Scientology members. In response to the movant's claim under section 3504, the government conducted a record search of no less than eleven federal agencies, including the National Security Agency. *See also In re Grand Jury Proceedings*, 643 F.2d 626 (5th Cir. 1981) (wherein the government provided a "categorical denial" in response to movant's "general assertion" that questions asked by grand jury were derived from illegal wiretaps). By contrast, there was no *denial* in the present case, the sole government response being a qualified statement of the Assistant U.S. Attorney expressing his *belief* that no surveillance had taken place.

CONCLUSION

For the reasons stated above and in Petitioner's original Petition for a Writ of Certiorari, it is respectfully submitted that this Court should grant a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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